FOR ARGUMENT

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IN THE

Supreme Court of the United States

October Term 1989

NANCY BETH CRUZAN, by her parents and co-guardians, Lester L. and Joyce Cruzan,

Petitioners,

v.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, AND ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,

Respondents,

v.

THAD C. MCCANSE, Guardian ad litem,

Respondent.

On Writ of Certiorari
To the Missouri Supreme Court

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF RESPONDENTS

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Brames, McCormick, Bopp & Abel
191 Harding Avenue
P.O. Box 410
Terre Haute, Indiana 47808-0410
(812) 238-2421
Counsel for Amicus Curiae

October 16, 1989

Graphics Ltd., Indianapolis, IN 46202

STATEMENT OF THE ISSUES HEREIN

The issue in this case is as follows:

> Is a State required under the United States Constitution to authorize court-appointed guardians to cause the death of their incompetent and dependent ward by denying her food and fluids when she is not terminally ill and there is no clear and convincing evidence of her intent?

The three sub-issues dealt with herein are:

1. What principles established by this Court govern the formulation of proposed fundamental rights to be measured for fundamentality against the history and tradition of our Nation?

2. Under these principles, what is the proper formulation of the proposed fundamental right in this case?

3. Measuring the properly-formulated, proposed fundamental right against the history and tradition of our Nation, does a fundamental right exist which governs the decision in this case?

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North Dakota State Bd. v. Snyder's Drug Stores, 414 U.S. 156 (1973) 17

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Adult Health Care Decisions Act, ch. 3, § 145B.04(6) 1989 Minn. Sess. Law Serv. 7 (West) 23

Adult Health Care Decisions Act, ch. 3, § 145B.13(2), 1989 Minn. Sess. Law. Serv. 12 (West) 23

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Okla. Stat. Ann. tit. 63, § 3102(4) (West Supp. 1989) . 22, 23

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Or. Rev. Stat. § 163.200(1) (1987) 27

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Other Authorities

39 Am. Jur. 2d *Guardian and Ward* § 68 (1964) 27
A. Cox, *The Role of the Supreme Court in American Government* (1976) 4
ARC Resolution on Cessation of Nutrition and/or Hydration, 3 Issues in L. & Med. 313 (1987) 26
Barry, *Facing the Hard Cases: The Ethics of Assisted Feeding*, 2 Issues in L. & Med. 99 (1986) 25
Bleich, *Providing Nutrition and Hydration for the Terminally Ill Patients*, 2 Issues in L. & Med. 117 (1986) 25
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Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 BYU J. Pub. L. 181 (1989) 5

Bopp, *Is Assisted Suicide Constitutionally Protected?*, 3 Issues in L. & Med. 113 (1987) 18
Bopp, *Nutrition and Hydration for Patients: The Constitutional Aspects*, 4 Issues in L. & Med. 3 (1987) 25
Bopp, *The Elusive Abortion Right*, The Nat'l L.J., June 12, 1989, at 13, col. 1 15
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Grant & Forsythe, *The Plight of the Last Friend: Legal Issues for Physicians and Nurses in Providing Nutrition and Hydration*, 2 Issues in L. & Med. 277 (1987) 25
Havens, *Psychosocial Implications of Providing Nutrition and Hydration to Patients*, 2 Issues in L. & Med. 301 (1987) 25

Hoberman, *The Legal Impact of Sanctioned Assisted Suicide on Adolescents*, 4 Issues in L. & Med. 191 (1988) 18

Horan, *Failure to Feed: an Ethical and Legal Discussion*, 2 Issues in L. & Med. 149 (1986) 25

I. van der Sluis, *The Practice of Euthanasia in the Netherlands*, 4 Issues in L. & Med. 455 (1989) 19

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Marzen, O'Dowd, Crone & Balch, *Suicide: A Constitutional Right?*, 24 Duq. L. Rev. 1 (1985) 18

May, Barry, Griese, Grisez, Johnstone, Marzen, McHugh, Meilanender, Siegler & Smith, *Feeding and Hydrating the Permanently Unconscious and Other Vulnerable Persons*, 3 Issues in L. & Med. 203 (1987) 21, 25-26

Meilaender, *The Confused, the Voiceless, the Perverse: Shall We Give Them Food and Drink?*, 2 Issues in L. & Med. 133 (1986) 25

New York Times, October 9, 1977, at 1, col. 1 9

Richman, *Sanctioned Assisted Suicide: Impact on Family Relations*, 3 Issues in L. & Med. 53 (1987) 18

TASH Resolution on Nutrition and Hydration, 3 Issues in L. & Med. 315 (1987) 26

Transcript of Arguments Before High Court on Abortion Case, The New York Times, April 27, 1989, at B12, col. 1 24

Uddo, *The Withdrawal or Refusal of Food and Hydration*, 2 Issues in L. & Med. 39 (1986) 25

United Handicapped Federation Resolution, 3 Issues in L. & Med. 317 (1987) 26

INTEREST OF AMICUS CURIAE[1]

The National Right to Life Committee, Inc. (NRLC) is a nonprofit organization whose purpose is to promote respect for the worth and dignity of all human life. NRLC is comprised of a Board of Directors representing 51 state affiliate organizations and more than 2,000 local chapters made up of individuals from every race, religious tradition, ethnic background, and political belief. NRLC engages in various political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of innocent human life.

The members of NRLC have been prime supporters of laws protecting incompetent persons from the denial by third parties of nutrition and hydration. They seek by this brief to advance these interests by supporting the decision of the Missouri Supreme Court in this case.

SUMMARY OF ARGUMENT

Prior to measuring a proposed fundamental right against the history and tradition of our Nation — to determine whether it has been considered a fundamental liberty — the proposed right must be properly formulated. Failure to properly formulate the proposed right risks constitutionally illegitimate decisions. To avoid this problem, this Court has employed certain principles in formulating proposed fundamental rights. These are formulated herein into a derived rule.

As a general rule, the precedents of this Court require that a proposed right be expressed in a concrete, fact-sensitive manner. This general rule is comprised of a three-prong consideration. First, the formulation of a proposed fundamental right

[1] This brief is filed with permission of all the parties. Letters of permission have been filed with the Clerk of this Court.

should focus on the activity proposed to be protected by taking into account all relevant facts. Second, the formulation of a proposed fundamental right should not be overbroad so as to encompass other activities which are logically distinct and involve separate considerations. Third, the formulation of a proposed fundamental right should reasonably accommodate all the interests at stake in the case.

Under these principles, established by the precedents of this Court, the formulation of the proposed fundamental right in this case must take into account certain basic facts. This necessarily includes the fact that the activity sought to be protected is the active termination of an innocent human life by starvation or dehydration. Examining the history and tradition of this Nation, as well as current attitudes concerning such an activity, reveals that there is no fundamental liberty, protected by the Constitution, for such action. Therefore, the decision of the Missouri Supreme Court should be affirmed.

ARGUMENT

It is not sufficient for constitutional adjudication of asserted fundamental rights to ask whether the asserted right is fundamental in the history and tradition of our Nation. One must first ask whether the asserted right is the properly formulated one.

For example, suppose a person came before this Court wishing to find constitutional protection for the ancient custom of sacrificing one's child to a deity. Of course, while the practice might be common in the history and tradition of the ancient world, it would not be a common practice in the history and tradition of this Nation. Reason dictates that no fundamental right be recognized, despite the hoary roots of the practice.

But this result, which seems so obvious, rests entirely upon the expectation, both logical and intuitive, that the proposed right would be formulated to include the activity of a parent killing a child rather than as the abstract right of a parent to

control their children.[2] The latter formulation would certainly find historical support in this Nation, but would be an incorrect formulation of the activity advanced for constitutional protection.

Because of the problem illustrated by this example, this Court has established principles governing the formulation of a proposed fundamental right. Proper formulation of the right is a necessary threshold step before the proposed right is measured for fundamentality against the history and tradition of our Nation.

The principles governing the formulation of a proposed right may be succinctly stated in a rule. Under this rule, given below, it is clear that some formulations are proper and some are not.

This brief analyzes the proposed formulations of the proposed right in this case under this rule of formulation. It demonstrates that only one formulation is proper. When this formulation of the proposed fundamental right is measured against the history and tradition of our Nation, it is clear that it may not be ranked as a fundamental right.

I. THIS COURT'S FUNDAMENTAL RIGHTS ANALYSIS REQUIRES THAT A PROPOSED FUNDAMENTAL RIGHT BE FORMULATED IN A CONCRETE, FACT-SENSITIVE MANNER BEFORE BEING MEASURED AGAINST THE HISTORY AND TRADITION OF OUR NATION.

Because it has recognized the danger that certain modes of constitutional review might result in constitutionally illegitimate decisions, this Court has established principles governing the formulation of proposed fundamental rights.

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[2] Likewise, some formulations of alleged fundamental rights, such as the right to control the makeup of one's family, would logically encompass infanticide. *Cf.* L. Tribe, *American Constitutional Law* 1359 (2d ed. 1988).

A. This Court Has Recognized the Danger of Constitutionally Illegitimate Decisions.

This Court has recognized dangers which must be avoided in its adjudication of cases before it. Three of these dangers are pertinent to the formulation of the proposed fundamental right in this case.

The first danger is that of result-oriented formulations of issues or rules. Often the very formulation of a rule or an issue dictates the outcome of a judicial decision. To prevent such decision-by-definition, this Court has endeavored to establish neutral principles to govern its decisions. A. Cox, *The Role of the Supreme Court in American Government* 114 (1976). These neutral principles, equally applicable to all cases no matter what their subject, must then be *applied* in an equally neutral manner to all cases.

For present purposes, this principle means that the formulation of the proposed fundamental right in the case at bar must be formulated without regard to the decisional outcome.[3] Rather, the formulation of the proposed fundamental right must be governed by the principles established by this Court in prior cases.

The second danger, closely related to the first, is that of constitutionally illegitimate decisions resulting from a failure to supply a firm grounding for a decision in the history and text of the Constitution. This danger is not only to the integrity of the court making the decision but also to the principle of the rule of law, a cornerstone of our constitutional Republic. If "the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court," *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977), the rule of law has been supplanted by the rule of man. While rule

[3] That establishing neutral principles is difficult at times may be seen in the colloquys among members of this Court in the cases discussed *infra*. However, the difficulty of the endeavor neither vitiates the importance and need to establish neutral principles nor counsels abandonment of the effort.

by Platonic guardians or a monarch has advantages over governance by law under "a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past," *Michael H. v. Gerald D.*, 109 S.Ct. 2333 (1989) (Brennan, J., dissenting), it was the considered opinion of the Framers of our Constitution and the People of the United States that the advantages of a constitutional rule-of-law regime outweighed its disadvantages. They established this Nation as a rule-of-law regime par excellence, with the Constitution as the supreme law of the land.[4]

The result of this decision by the People of our Nation is that decisions of the judiciary are only legitimate if they can demonstrate by reasoned opinion that they are firmly grounded in the Constitution. As stated by Justice White:

> The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers . . . , the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause . . . .

Moore, 431 U.S. at 544 (White, J., dissenting); *cf. Bowers v.*

[4] For a fuller discussion of this point, *see* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 BYU J. Pub. L. 181, 194-98 (1989). The Framers of the Constitution did allow for changes in the Constitution by means of amendment, as occurred after the Civil War with regard to slavery, and by the use of general language in the formulation of its express protections. However, some textual indeterminacy is not a license to abandon the rule of law by rejecting the Constitution in favor of unbridled discretion for any branch of the government. The danger is especially acute when the judiciary deals with penumbral rights, which are already derived from general formulations.

Hardwick, 478 U.S. 186, 2846 (1986) (White, J., writing for the majority).

When this principle is applied to formulation of the proposed fundamental right herein, it is clear that the formulation must not be a generalized abstraction countenancing innumerable protections under the rubric of a fundamental right. Employing a sufficiently broad characterization of proposed constitutional rights, one could arguably encompass nearly anything within the pale of the Constitution. But such a practice is self-evidently illegitimate as constitutional law, because it places no limits on the discretion of the judiciary. The result would be the rule of man rather than the rule of law.

A third danger recognized by this Court is that of overbroad decisions in violation of its constitutionally allotted power under Article III of the Constitution and in violation of sound principles of adjudication.

As applied to the formulation of the proposed fundamental right in the present case, this danger may be avoided by confining consideration of fundamental rights protection to the actual case at bar. To define the proposed fundamental right overbroadly is to decide matters not before this Court.

To avoid these dangers, this Court, in prior formulations of proposed fundamental rights, has agreed on certain basic principles which may be formulated into the following rule.

B. This Court Requires That a Proposed Right Be Expressed In a Concrete, Fact-Sensitive Manner To Guard Against the Danger of Illegitimate Decisions.

From the precedents of this Court which deal with substantive due process analysis, the basic principle governing the formulation of a proposed fundamental right may be determined: *This Court requires that a proposed right be expressed in a concrete, fact-sensitive manner.*

Further development of this principle is evident in the precedents which may be summarized into a three-prong rule discussed below. The first prong may be stated as follows.

1. The Formulation of a Proposed Fundamental Right Should Focus on the Activity Proposed to Be Protected by Taking Into Account All Relevant Facts.

The formulation of a proposed fundamental right should focus upon the *activity* actually involved in the case at bar rather than upon broad, abstract formulations of general historical rights. This assures the concreteness which is appropriate when the expansion of recognized constitutional protections is contemplated into areas without express protection in the text of the Constitution.

The level of factual specificity should be that governed by *all facts relevant to the activity* sought to be protected. It is evident that certain facts of a case are only incidental to the activity for which constitutional protection is sought. Inclusion of these irrelevant facts in the formulation of a proposed right would be the equivalent of limiting a holding to its facts. By such a practice, no principles relevant to other cases could ever be established. Reason precludes such specificity just as it precludes broad, sweeping, abstract formulations of a proposed right.

In practice then, satisfaction of this prong is attained by careful formulation of the proposed right to be certain that it is a concrete and fact-sensitive statement of the activity sought to be protected, but that it is not so fact-sensitive as to include matters irrelevant to the activity. Thus, a balance between overly narrow and overly broad formulations is obtained by an emphasis on *relevant facts* and upon the *actual activity* advanced before the Court.

For example, in a case where a person of one race desires to marry a person of another race, the fact that a man and woman are of different races is irrelevant to the activity of entering into a marriage, which involves a state-sanctioned covenant between a man and a woman to live in an historically recognized

relationship.[5] Likewise, the fact that one of the parties is incarcerated at the time he or she wishes to enter into a marriage relationship is irrelevant to the act of entering into a marriage relationship.[6] Certain facts would be relevant to the activity of marriage, which would necessarily be included in the formulation of a proposed marriage relationship. For example, marriage between persons of the same sex would be relevant, as altering radically the notion of marriage. See *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971) ("[I]n commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."), *appeal dismissed* 410 U.S. 810 (1972). Likewise, a proposed marriage between a person and a member of another species, e.g., a horse, or between a person and an inanimate object, e.g., a computer, would certainly require incorporation of those facts into the proposed fundamental right.

[5] *Cf. Loving v. Virginia*, 388 U.S. 1 (1967) (miscegenation law struck down on equal protection and substantive due process bases).

[6] *Cf. Turner v. Safley*, 482 U.S. 78 (1987) (striking down prison regulations of marriage and noting that marriage of a prisoner retained enough of the incidents of marriage to make the fact that one of the parties was in prison irrelevant to the exercise of the constitutionally protected right to marry).

The proper formulation of a proposed fundamental right should begin with the facts presented by case, by which a court is governed under Article III, and then remove those that are irrelevant. So, for example, *Bowers* began with the fact that the case involved two males, which eliminated the need to consider heterosexual sodomy, but whether the sodomy was oral or anal was irrelevant. *See infra*, Section I(C)(1). Similarly, in *Turner*, this Court was presented with the fact that a person incarcerated sought to enter into a marriage without state interference. This Court found that incarceration was not relevant to the formulation of the proposed protected activity, marriage. *Turner*, 107 S.Ct. at 2265.

The analysis of *Turner* also reveals that, before this Court considers whether a state has a compelling interest for burdening a fundamental right, it must consider whether the restriction passes the rational basis test, which the prison restriction on marriage, in *Turner*, failed. *Id.* at 2266. Many state regulations considered by this Court under heightened substantive due process scrutiny also fail a rational basis test. *Cf., e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972) (there is no rational basis for withholding contraception from unmarried couples engaging in copulation despite legal restrictions. Indeed, the state's interest in having such couples employ contraceptive measures would logically be greater than not having them do so. Moreover, for purposes of framing the proposed fundamental right, a focus on the *activity* being engaged in, sexual intercourse with contraceptive measures, reveals that whether the couple is married is irrelevant to the activity).

2. The Formulation of a Proposed Fundamental Right Should Not Be Overbroad so as to Encompass Other Activities Which are Logically Distinct and Involve Separate Considerations.

The second prong provides another, conceptually distinct, check on an overbroad formulation of a proposed fundamental right. It is the requirement that the formulation *should not encompass other activities which are logically distinct and involve separate considerations.*

For example, suppose that a person came before this Court seeking constitutional protection for a polygamous relationship.[7] While the practice has venerable roots elsewhere, the fundamentality of this proposed fundamental right in the history and tradition of this Nation would turn on the formulation of the proposed fundamental right to be historically tested. If the proposed right were styled simply the right to marry, encompassing by its terms both monogamous and polygamous marriages, the outcome would be doubtless, for a fundamental right to marriage has already been established. *Zablocki v. Redhail*, 434 U.S. 374 (1978). If, however the proposed right were formulated in a more concrete, fact-sensitive manner, i.e., the right of a person to have multiple, concurrent spouses then the outcome is also doubtless, for polygamy has been rejected

[7] This illustration assumes, of course, that this Court would not simply invoke stare decisis to decide a case challenging laws prohibiting polygamy. *Cf. Reynolds v. United States*, 98 U.S. 145 (1878) (upholding anti-polygamy laws against constitutional attack) *with* New York Times, October 9, 1977, at 1, col. 1 (estimating that twenty to thirty thousand people in the United States live in polygamous families).

in the history and tradition of our people.[8]

3. The Formulation of A Proposed Fundamental Right Should Reasonably Accommodate All the Interests at Stake in the Case.

The third prong assures that in pruning away relevant facts, the formulator has not pruned away other interests at stake in the case: the formulation *should reasonably accommodate all the interests at stake in the case*. These may not be lopped off as irrelevant, but are *per se* relevant and must be included in the formulation. If interests are at stake in a case, i.e., will be affected by the proposed declaration of fundamental right, they are relevant to an activity advanced for constitutional protection and must be reasonably accommodated by inclusion in the formulation of the proposed fundamental right. Logically, of course, they must also be considered in determining whether one may exercise a right declared fundamental or is denied this liberty by the compelling interests of others. However, the presence of other relevant interests must be considered in the formulation of the proposed fundamental right to prevent abstract formulations and to prevent declaration of fundamental right which are not properly so, with the result that all state regulation of such activities must be supported by a compelling interest and narrowly tailored to effect only that interest.

For example, a proposed fundamental right to discharge firearms, the possession of which is expressly protected in the Constitution, is logically distinct from a right to discharge a firearm *into* an innocent person. The latter's interests logically

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[8] *Reynolds*, 98 U.S. 145. The fact that ours is "not an assimilative, homogenous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practice," *Michael H.*, 109 S.Ct. at 2351 (Brennan, J., dissenting), and in which "'liberty' must include the freedom not to conform," id., has not caused this Court to reject all of our culture's traditional values. Indeed, the very concept of a culture presupposes some commonly held values which to some unavoidable extent are imposed upon non-conformists. Thus, the Supreme Court, in *Reynolds*, forbade to Mormons the right not to conform with regard to polygamy.

must be included in the very formulation of the proposed fundamental right.

C. This Court Has Employed This Rule In Its Fundamental Rights Cases.

This tri-partite rule for the correct formulation of proposed fundamental rights may be seen in several of this Court's cases.

1. The Example of *Bowers v. Hardwick*.

In *Bowers v. Hardwick*, 478 U.S. 186 (1986), this Court applied the principles underlying the rule presented herein by formulating the proposed fundamental right as the right to engage in "consensual homosexual sodomy." *Id.* at 188 n.2. By so doing, it dealt with the statute as applied, focusing on the specific activity for which constitutional protection was sought.

In its formulation, the Court did not include facts which were irrelevant, e.g., whether the homosexual sodomy sought to be protected involved oral or anal genital contact. Reason precludes separate consideration of each possible form of sodomy between homosexuals.

The Court excluded heterosexual sodomy from its formulation because it was not a part of the activity for which constitutional protection was sought. *Id.* Such a formulation, in addition to being beyond the facts of the case, would have involved logically distinct and separate considerations, e.g., whether, if the couple were married, the principle underlying *Griswold v. Connecticut*, 381 U.S. 479 (1965), would preclude regulation of their activities. Because no marriage partner or other identifiable party with a relevant interest was presented by the facts, the Court discussed no interests of third parties.

The *Bowers* Court discussed and rejected several proposed abstract formulations, noting their overbroad sweep. The Court first noted that simply declaring the right to homosexual sodomy to be encompassed by the right of privacy was improper, because none of the activities to which that right had been extended, e.g., "family, marriage, or procreation,"

Bowers, 478 U.S. at 190, bore any logical "connection" to homosexual sodomy. *Id.*[9] Second, the Court rejected the broad formulation of a right to engage in "any kind of private sexual conduct between consenting adults," noting that precedent had determined that the privacy right established by *Griswold* "did not reach so far." *Id.* at 191 *(citing Carey v. Population Services International*, 431 U.S. 678, 688 n.5, 694 n.17 (1977)). Third, the *Bowers Court* rejected a formulation of the proposed fundamental right, as the right to do what one wishes "in the privacy of the home." *Bowers*, 478 U.S. at 195. The Court noted that numerous activities, such as possession of drugs and illegal weapons, are not constitutionally protected although they occur in the home. *Id.* The Court further noted that narrowing the formulation by considering only "voluntary sexual conduct between consenting adults" in the privacy of the home would include within its scope "adultery, incest, and other sexual crimes" committed in the home. *Id.* at 195-96.

By contrast, the *Bowers* dissenters formulated the proposed fundamental right in broad, abstract terms. Nor did they focus on the specific activity. Indeed, they proposed ten different, abstract formulations of a right which would encompass and protect homosexual sodomy.[10] But by the abstractness of these dissenting formulations, the dissenters cast a wide net, snar-

[9] This comparative sort of analysis is favored by Justice Brennan, *Michael H.*, 109 S.Ct. at 2351, who would prefer a methodology which first establishes "more generalized interests" as fundamental and then examines "the concrete limitation under consideration" to see whether it "impermissibly impinges" on the "generalized interest." However, as noted elsewhere, *see infra* note 11, such an analysis shifts the locus of power from the people, as established in the Constitution, to the judiciary.

[10] The dissenters formulated the proposed right as "the right to be let alone," *Michael H.*, 109 S.Ct. at 199 (Blackmun, J., dissenting) (quotation marks and citation omitted), the right to make "certain *decisions*" and do activities in "certain *places*," *id.* at 204 (emphasis in original), to do things which "form so central a part of an individual's life," *id.* at 204, "the ability independently to define one's identity," *id.* at 205 (quotation marks and citation omitted), "the

(footnote continued)

ing numerous activities within their confines. For example, many of these formulations would enclose the practice of polygamy, discussed above, as well as adultery and incest.[11]

In sum, the *Bowers* Court carefully followed the principles of the rule set forth in this brief, rejecting the broad, abstract formulations of the proposed right urged by the dissenters.

2. The Example of *Michael H. v. Gerald D.*

Last term, the rule of formulation set forth herein was employed in this Court's decision of *Michael H. v. Gerald D.*, 109 S.Ct. 2333, which involved substantive due process analy-

Footnote 10 continued

freedom an individual has to *choose* the form and nature of these intensely personal bonds," *id.* (emphasis in original), "the fundamental interest all individuals have in controlling the nature of their intimate associations with others," *id.* at 206, "the right of an individual to conduct intimate relationships in the intimacy of his or her own home," *id.* at 208, and "the right to differ as to things that touch the heart of the existing order." *Id.* at 211. In addition, three dissenters formulated the proposed right as "the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny." *Id.* at 217 (Stevens, J., dissenting).

[11] The *Bowers* dissent logically conceded the correctness of the methodological point urged herein — at the same time that it rejected it in practice — by recognizing "simple, analytically sound distinctions between certain private, consensual conduct, . . . and adultery and incest." 478 U.S. at 209 n.4 (Blackmun, J., dissenting) (citation omitted).

The only reasonable place to make these distinctions is in the formulation of the proposed right. Otherwise, if a fundamental right to adultery and incest are found — based on a broad right to engage in "intimate relations in the intimacy of his or her home," *id.* at 208, — then a state would have to show a compelling interest and narrowly tailored restrictions to regulate these activities (a demanding, usually prohibitive task compared with traditional exercise of police powers).

Moreover, the *Bowers* dissenters want judges to have the power to recognize fundamental rights by definition, recognizing that distinctions exist among varieties of intimate activity, whereas the Bowers majority leaves the power to determine the extent of constitutional protection to the People, by employing neutral principles of formulation.

sis.[12] The proposed right, in *Michael H.*, was formulated as "the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man." 109 S.Ct. at 2343 (plurality opinion).[13]

[12] This brief employs the terminology of substantive due process analysis as follows. "Liberty interests" include those activities which individuals would like to do without government regulation and which are constitutionally protected only under the rational-basis standard of review. "Fundamental liberty interests" and "fundamental rights" are those interests for which a compelling interest must be shown before narrowly tailored state restrictions may be enforced. Both levels of liberty interests are a part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. *Cf. Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("fundamental liberty interest" requires compelling interest); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 788-97 (1986) (White, J., dissenting) (abortion is a rational-basis type liberty); *Roe v. Wade*, 410 U.S. 113, 172-73 (1973) (Rehnquist, J., dissenting) (abortion is a rational-basis level of liberty); *Webster v. Reproductive Health Service*, 109 S.Ct. 3040, 3058 (1989) (plurality opinion) ("[T]here is wisdom in not unnecessarily attempting to elaborate the abstract differences between a 'fundamental right' to abortion, . . . a 'limited fundamental constitutional right,' . . . or a liberty interest protected by the Due Process Clause."); with *Michael H.*, 109 S.Ct. at 2344 (plurality opinion) ("This is not the stuff of which fundamental rights qualifying as liberty interests are made."); *Id.* at 2352 (Brennan, J., dissenting) ("liberty interest" used as requiring a compelling interest).

[13] Justice White did not agree with the plurality in *Michael H.* concerning the formulation of the fundamental right in that case. He was of the opinion that any interest of the third party, Gerald D., required no additional consideration in that case. Id. at 2362 (Gerald D. was already "well aware of the liaison."). However, this disagreement over the application of the principles stated herein does not constitute rejection by Justice White of the principle of narrow, concrete, fact-sensitive formulation of proposed fundamental rights, which he employed in the opinion he authored for this Court in *Bowers*.

While certain members of this Court have differed as to the rule governing the precise level of specificity for formulating proposed fundamental rights, *cf. Michael H.*, 109 S.Ct. at 2344 n.6 (plurality opinion), with id. at 2346 (O'Connor, J., concurring in part), this debate does not affect the formulation of the proposed fundamental right in the case at bar. Under the general principles established by this Court, the formulation herein must be at least sufficiently specific to include the fact that the active starvation and/or dehydration death of an innocent human life is contemplated.

This formulation of the proposed rule is consistent with the rule advanced in this brief. First, it is concrete, and fact-sensitive, including all relevant facts. Second, the formulation does not encompass other activities which are logically distinct and involve other considerations. Third, the formulation does not ignore the other interests involved in the case.

3. The Example of *Roe v. Wade*.

A third example may be found in this Court's formulation of the proposed fundamental right in *Roe v. Wade*, 410 U.S. 113 (1973). While your amicus does not concede the correctness of *Roe*'s holding, *Roe* did correctly formulate the proposed fundamental right as a right to abortion.[14] This is especially evident in light of the efforts at oral arguments in *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), to reformulate the right from a right to abortion to a right of procreative choice. *See* Bopp, *The Elusive Abortion Right*, The Nat'l L.J., June 12, 1989, at 13, col. 1.

In *Roe*, this Court formulated the proposed fundamental right in a concrete, fact-sensitive manner: the right to abortion. It did not include within its formulations matters such as contraception and sterilization — encompassed by a more general right of procreation — which are logically distinct and involve other considerations. Nor did this Court agree with the overbroad formulation proposed by some amici in *Roe* of "an unlimited right to do with one's body as one pleases." 410 U.S. at 154. Further, the Roe Court formulated the proposed fundamental right to abortion in a manner which included the concept of terminating the existence of the unborn, thus

[14] *Roe* focused specifically on the practice of abortion in its historical sketch. However, as this historical sketch did not demonstrate what was desired, the majority resorted to the bare assertion that abortion was encompassed in a broader right of privacy. This was a flawed mode of analysis under other cases of this Court dealing with substantive due process. In addition, *Roe* failed to adequately accommodate the interests of the unborn child in the balancing of rights. However, its formulation of the right as a right to abortion did logically encompass the terminating of the unborn child's life.

encompassing all interests at stake from the facts before the Court. While your amicus believes that the interests of the unborn were not reasonably accommodated, the methodology of proposed rights formulation was sound.

II. THE POSSIBLE FORMULATIONS FOR A PROPOSED FUNDAMENTAL RIGHT HEREIN MUST BE APPRAISED UNDER THIS RULE BEFORE BEING MEASURED AGAINST THE HISTORY AND TRADITION OF OUR NATION.

As has been demonstrated, this Court has established principles in its formulation of proposed fundamental rights to prevent constitutionally illegitimate decisions. These principles must be applied to the proposed formulations for a fundamental right in the case at bar.

A. Certain Key Facts Must Be Considered In the Formulation of the Proposed Fundamental Right.

In establishing a concrete, fact-sensitive formulation of the proposed fundamental right in this case, certain key facts must not be neglected.

Among the key facts are the following: (1) a relationship already exists between Nancy Cruzan and her physicians and medical care-givers, which requires them to provide her with medical care and the necessities of life; (2) Nancy Cruzan is incompetent to give or refuse consent to treatment; (3) Nancy Cruzan has not expressed her intent with regard to such consent by clear and convincing evidence; (4) Nancy Cruzan is not terminally ill and will live indefinitely if provided medical care and the necessities of life; and (5) the gastrostomy tube by which Nancy Cruzan receives nutrition is already in place and will be left in place, unused, if the Guardians prevail, and (6) provision of nourishment through an in-place tube is not difficult, expensive, painful, or burdensome.[15]

[15] *See* Brief Amicus Curiae of the American Academy of Medical Ethics in Support of Respondents, herein (showing the provision of food and fluids is ordinary care).

A final, unavoidable fact of this case is that (7) withholding nourishment will inevitably, actively cause the death of an innocent person, Nancy Cruzan, by starvation and/or dehydration without clear and convincing evidence of her intent concerning the matter. This fundamental fact may not be ignored in the formulation of the proposed right by euphemisms or legal fictions under the precedents of this Court.[16]

B. The Guardians' Formulations of the Proposed Fundamental Right Herein Are Overly Broad and Ignore the Key Fact That Active Termination of Innocent Human Life Would Result.

The formulations of the proposed fundamental right presented by the Guardians do not include the key fact that the activity sought to be protected by the Constitution includes the active termination of innocent human life. Rather, they studiously focus on broader over-arching principles which logically encompass many activities.

The Guardians' first formulation of the fundamental right is the right to bodily integrity. Brief for Petitioner at 17. Second, the Guardians insist on a constitutional right to substituted judgment for incompetent persons to make exercise their right to bodily integrity. *Id.* at 20. Third, the Guardians formulate the right to a substitute decisionmaker as a right of the family to make decisions for other family members. *Id.* at 22. These will be examined in turn.[17]

[16] *Id.* at 6-7 (discussing judicial opinions which have identified this as the central issue in cases such as this).

[17] Certain physician amici in this case would formulate the proposed right to encompass the "Substantial Impact . . . On The Practice Or [Sic] Medicine." Brief Amici Curiae of the American Medical Association, et al. in Support of Petitioners, herein, at 46. To the extent the formulation of such a right contemplates a substantive due process right of the medical profession to practice medicine without interference by the states, such a right has already been rejected as not being fundamental. *North Dakota State Bd. v. Snyder's Drug Stores*, 414 U.S. 156 (1973) (overruling *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928)).

1. The "Bodily Integrity" Formulation.

While both the common law and constitutional law have traditionally provided protections having to do with unwarranted bodily intrusions by the state, the precedents of this Court dictate a narrower formulation of the proposed fundamental right in this case.

As noted above, this Court rejected an absolute right of a person to do with one's body as one wills in the case of *Roe v. Wade*, 410 U.S. at 154. Such a formulation is overly broad, not concrete, not fact-sensitive, and does not focus on the proposed activity for which constitutional protection is sought. Widespread societal and historical support may be found for the notion of bodily integrity. However, the support changes, as noted below, when starvation of an innocent ward is contemplated.

For example, under a broad, abstract, bodily-integrity formulation, support may be found in the history and tradition of our Nation for activities such as suicide and assisted suicide.[18] However, under a concrete, fact-sensitive formulation of these proposed rights, it is clear that these activities are not condoned in our Nation's history and tradition.[19]

To avoid the dangers of decision-by-definition or fundamentality-by-formulation, the proposed right in this case must be formulated to describe the *activity* for which constitutional protection is sought. Only such a formulation is neutral.

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[18] For a demonstration that there is no constitutional right to suicide or assisted suicide, formulated in a properly narrow and concrete manner, *see* Marzen, O'Dowd, Crone & Balch, *Suicide: A Constitutional Right?*, 24 Duq. L. Rev. 1 (1985); Bopp, *Is Assisted Suicide Constitutionally Protected?*, 3 Issues in L. & Med. 113 (1987). Particularly troubling would be the application of this fundamental right to adolescents. Would the same pattern be followed as governs the abortion right of adolescents? *Cf.* Hoberman, *The Legal Impact of Sanctioned Assisted Suicide on Adolescents*, 4 Issues in L. & Med. 191 (1988); Richman, *Sanctioned Assisted Suicide: Impact on Family Relations*, 3 Issues in L. & Med. 53 (1987).

[19] Marzen, O'Dowd, Crone & Balch, *supra* note 18, at 17-100.

2. The "Substituted Judgment" Formulation.

In like manner, the notion of a constitutional right to have one's decisions made and implemented for them when incompetent may be a popular notion in the history and traditions of our Nation. However, when framed in terms of a right to have someone starve or dehydrate an incompetent person, little support may be found.

For example, if framed in terms of a *substituted-judgment* right, one might find historical and traditional support for activity which includes active euthanasia by injection for incompetent persons.[20] However, when framed in terms of the actual activity proposed for constitutional protection, it is evident that no historical support exists for such a practice in this Nation, although historical support for the practice may be found in the practices of the Third Reich and elsewhere.[21]

The issue, therefore, must be framed in as neutral a manner as possible to avoid deciding the case when formulating the issue. The principles established by this Court provide neutral guidelines for formulation, and mandate that the concept of active starvation of an innocent human being be included in the formulation of an proposed right to substituted judgment.

3. The "Family Decisionmaking" Formulation.

Guardians note that this Court "has recently reaffirmed that families . . . are the bedrock of [this Nation's] history and tradition." Brief of Petitioners at 24. While no one would dispute this proposition, it is not a proper formulation of the proposed fundamental right herein. This is so because it fails to focus upon the family *activity* sought to be protected.

While families indeed have historically been entrusted to

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[20] Active euthanasia by lethal injection is currently a common practice in the Netherlands. *See* I. van der Sluis, *The Practice of Euthanasia in the Netherlands*, and Bostrom, *Euthanasia in the Netherlands: A Model for the United States?*, 4 Issues in L. & Med. 455 and 467 (1989).

[21] *Id.*

make decisions, and while the family unit is the fundamental building block of Western civilization, society has always placed restrictions upon the sort of decisions it could implement. As mentioned in the introduction, there are many decisions a family could make and implement for which no constitutional protection exists. For example, under the homicide laws of all states, a family may not decide to kill or sacrifice its children; the family may not decide to withhold needed medical care, *e.g.*, *In re Green*, 448 Pa. 338, 292 A.2d 387 (1972); it may not physically abuse its children, *e.g.*, *State v. Loss*, 204 N.W.2d 404 (Minn. 1973); it may be forbidden to multiply spouses, *Reynolds*, *supra;* and, under the homicide laws of all states, it may not kill its elderly when they become economically unproductive. The notion of family decisionmaking is highly honored in our society but is too broad to be employed as a formulation of a proposed fundamental right herein.

Rather, the focus must be on what decision the family wishes to implement. In the case at bar, this must include the activity of starving or dehydrating an innocent human being.

C. A Proper Formulation of the Proposed Fundamental Right Is "The Right of Court-Appointed Guardians to Cause the Death of Their Incompetent and Dependent Ward by Denying Her Food and Fluids When She Is Not Terminally Ill and There Is No Clear and Convincing Evidence of Her Intent?"

Based upon the principles for formulation of fundamental rights which this Court has established, a concrete, fact-sensitive formulation may be achieved which is not overbroad and does not ignore the interests of anyone. It is as follows: *the right of court-appointed guardians to cause the death of their incompetent and dependent ward by denying her food and fluids when she is not terminally ill and there is no clear and convincing evidence of her intent.*

This is the proposed fundamental right which must be measured by the history and tradition of our Nation. First, it takes

into account the relevant facts of the case, i.e., it indicates the relationship of the parties and specifies the precise activity which is being proposed for protection. Further, this formulation encompasses the relevant legal doctrines governing guardianship, intent regarding bodily integrity, homicide, and evidence (by noting that there is no clear and convincing evidence of Nancy Cruzan's intent). In addition, a marginal gloss should be added to note that the provision of the food and fluid is neither expensive not burdensome and that removal of the in-place tube will remain implanted in any event. This formulation takes into account all interests at stake and does not reach overbroadly to encompass matters logically distinct and involving separate considerations.[22]

Of course, a certain degree of flexibility in formulation inheres in the rule derived from the principles employed by this Court. There may be variations on the theme. However, there is no principled way to avoid inclusion of the fact of active termination of innocent life in any formulation. It must be included in the proposed right, regardless of the level of specificity employed regarding other facts.

III. TESTING THIS FORMULATION OF THE PROPOSED RIGHT BY THE HISTORY AND TRADITIONS OF THIS NATION REVEALS THAT IT IS NOT A FUNDAMENTAL RIGHT.

After a proposed fundamental right is properly formulated, it must then be tested against the history and tradition of our Nation. Because any formulation herein must include the key fact of active termination of an innocent life, it is clear that the tradition and history of our Nation provide no support for a finding of fundamentality.

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[22] The fact that Nancy Cruzan is also not terminally ill is relevant, because "when a person is imminently dying, a time often comes when it is really useless or excessively burdensome to continue hydration and nutrition." May, Barry, Griese, Grisez, Johnstone, Marzen, McHugh, Meilaender, Siegler & Smith, *Feeding and Hydrating the Permanently Unconscious and Other Vulnerable Persons*, 3 Issues in L. & Med. 203, 209 (1987).

A. There Is No National Consensus Approving the Withdrawal of Food and Water from an Incompetent Person.

The Guardians assert that there is a national consensus supporting the proposed action of the Cruzans. Brief of Petitioners at 24-25. While there may be some consensus concerning the *general* notion that families should be involved in medical decisionmaking with regard to incompetent family members, there is no national consensus concerning the withdrawal of food and water from incompetent persons.

The best that can be said of the Guardians' claim of consensus is that there is a consensus among those who agree with each other. Outside of this circle of mutual approval, there is serious disagreement.

The numerous state laws which expressly exclude withdrawing food and fluids from terminally ill, incompetent persons belie the Guardians' assertion of a national consensus in this area.[23] For example, the Oklahoma living will statute provides

[23] The following 18 state statutes specifically exclude nutrition and hydration from the definition of life-sustaining procedures which may be withdrawn in a living will: Ariz. Rev. Stat. Ann. § 36-3201(4) (1986); Colo. Rev. Stat. § 15-18-103(7) (1987); Conn. Gen. Stat. Ann. §19a-570(1) (West Supp. 1988); Fla. Stat. Ann. § 765.03(3) (West 1986); Ga. Code Ann. § 31-32-2(5)(A) (1985 & Supp. 1989); Haw. Rev. Stat. § 327D-2 (Supp. 1987); Ind. Code Ann. § 16-8-11-4 (Burns Supp. 1988); Iowa Code Ann. § 144A.2(5) (1989); Me. Rev. Stat. Ann. tit. 22, § 2921(4) (Supp. 1988); Md. Health-Gen. Code Ann. § 5-605(1) (Supp. 1988); Mo. Ann. Stat. § 459.010(3) (Vernon Supp. 1988); N.H. Rev. Stat. Ann. § 137-H:2 (II) (Supp. 1988); Okla. Stat. Ann. tit. 63, § 3102(4) (West Supp. 1989); Or. Rev. Stat. § 97.050(3) (1987); Utah Code Ann. § 75-2-1103(6)(b) (Supp. 1988); Wis. Stat. Ann. § 154.01(5)(b) (1989); Wyo. Stat. § 35-22-101(a)(iii) (1988).

Fourteen jurisdictions do not mention whether food and hydration are included in the definition of life-sustaining procedures which may be withdrawn in a living will: Ala. Code §§ 22-8A-1 to -10 (1984); Cal. Health & Safety Code §§ 7185 to 7195 (West Supp. 1988); Del. Code Ann. tit. 16, §§ 2501 to 2509 (1983); D.C. Code Ann. §§ 6-2401 to -2430 (Supp. 1988); Kan. Stat. Ann. §§

(footnote continued)

that the "life-sustaining procedure" which may, in appropriate circumstances, be withheld or withdrawn, "shall not include the administration of nourishment, hydration and medication." Okla. Stat. Ann. tit. 63 § 3102(4) (West Supp. 1989).

In addition, legislation at both the state and federal levels has been adopted which prevents the withdrawal of food and water from incompetent patients except in very limited circum-

Footnote 23 continued

65-28,101 to -28,109 (1985); La. Rev. Stat. Ann. § 40:1299. 58.1 to .10 (West Supp. 1988); Miss. Code Ann. §§ 41-41-1-101 to -121 (Supp. 1988); Nev. Rev. Stat. §§ 449. 540 to .690 (1987); N.M. Stat. Ann. §§ 24-7-1 to -10 (1986); N.C. Gen. Stat. §§ 90-320 to -323 (1985); Tex. Rev. Civ. Stat. Ann. art. 4590h, §§ 1 to 11 (Vernon Supp. 1988); Vt. Stat. Ann. tit. 18, §§ 5251 to 5262 (1987); Va. Code Ann. §§ 54-325.8:1 to :12 (Supp. 1987); Wash. Rev. Code Ann. §§ 70.122.010 to .905 (Supp. 1988).

Two states provide provide for specific indication in a living will as to whether or not artificially provided food should be provided. Alaska Stat. §§ 18.12.010(c), 18.12.040(b) (1986); Idaho Code §§ 39-4504 (Supp. 1988).

Two states include forms of providing nutrition and hydration as life-sustaining procedures that may be withheld, but strictly prohibit withholding nutrition and hydration if the result would be death by starvation and dehydration: Ill. Ann. Stat. ch. 110 1/2, para. 702 § 2(d) (Smith-Hurd Supp. 1989); Tenn. Code Ann. § 32-11-103(5) (Supp. 1988).

Four states provide that their living will legislation does not affect the responsibility of the attending physician or other health provider to provide treatment, including nutrition and hydration, for a patient's comfort, care, or alleviation of pain: Ark. Stat. Ann. § 20-17-206(b) (Supp. 1987); Mont. Code Ann. § 50-9-202(2) (1987); S.C. Code Ann. § 44-77-20(b) (Law. Co-op. Supp. 1988); W.Va. Code § 16-3-3 (1985).

One state allows expression of intent as to provision of food and fluids in its living will, Adult Health Care Decisions Act, ch. 3, § 145B.03(2), 145B.04(6) 1989 Minn. Sess. Law Serv. 7 (West). This state provides further that provision of food and water to a receptive patient is "reasonable medical care," § 145B.13(2), 1989 Minn. Sess. Law. Serv. 12 (West), and that the "mere existence of a [living will] declaration . . . does not . . . create a presumption . . . that the declarant" would want food or fluids withdrawn or withheld. § 145B.03(2), 1989 Minn. Sess. Law. Serv. 7.

stances.[24] For instance, the Oklahoma Hydration and Nutrition for Incompetent Patients Act provides a legal presumption "that every incompetent patient has directed his health care providers to provide him with hydration and nutrition to a degree that is sufficient to sustain life." Okla. Stat. Ann. tit. 63 3080.3 (West Supp. 1989). On a national level, the United States Congress has adopted legislation which prohibits the withholding of appropriate nutrition, hydration, and medication for children born with congenital abnormalities, 42 U.S.C.A. 5106g(10) (West 1985 & Supp. 1989), and the Department of Health and Human Services has promulgated implementing regulations.[25]

Logically, there can be no fundamental right to an activity which the states have historically restricted by legislation.[26]

The Guardians' claim of a "consensus of state courts outside of Missouri" is also wrong. Indeed a strong counter-trend has developed, rejecting the first round of relevant cases which relied uncritically on one another. The counter-trend is evident in three recent cases: *In re Grant*, 109 Wash.2d 545, 747 P.2d 445 (1987), *modified*, 757 P.2d 534 (1988), *In re Westchester County Medical Center*, 72 N.Y. 2d, 534 N.Y.S.2d 886, 531 N.E.2d 607 (1988), and *Cruzan*, the case at bar.

To throw out *Cruzan*, as the Guardians would do, in deciding whether there is a consensus constitutes a circular argu-

[24] *See* Brief Amici Curiae of The Association for Retarded Citizens of the United States, et al. in Support of Respondents, herein, at Section VI(C) (setting forth support for the decision of the Missouri Supreme Court in laws and policies of the states).

[25] 45 C.F.R. 1240.15(b)(2). *Cf.* Bopp & Balch, *The Child Abuse Amendments of 1984 and their Implementing Regulations: A Summary*, 1 Issues in L. & Med. 91 (1985).

[26] *See Transcript of Arguments Before High Court on Abortion Case*, The New York Times, April 27, 1989, at B12, col. 1 (wherein Rehnquist, C.J., stated, in the *Webster* oral arguments, "If you say there is a deeply rooted tradition of freedom in this area, that suggests that there had been no legislative intervention to me . . . . [T]hat simply is not the fact.").

ment, i.e., there is a consensus because no cases disagreeing with the consensus may be considered. Furthermore, a consensus is asserted outside of Missouri by simply ignoring *Grant* and *Westchester*, which held otherwise.

Moreover, there is no consensus in the scholarly world. Numerous scholarly articles have appeared in opposition to the practice of withdrawing nutrition and hydration from incompetent patients in Nancy Cruzan's situation.[27]

Nor is there a consensus among organized medical groups as claimed by the Guardians. Brief of Petitioners at 25. There are substantial medical groups which would dissent from the Guardians' position herein, precluding a consensus.[28]

Also, there is no consensus among the potential victims of withdrawal of nutrition and hydration. Indeed, those most

[27] *See, e.g.*, Derr, *Nutrition and Hydration as Elective Therapy*, 2 Issues in L. & Med. 25 (1986); Uddo, *The Withdrawal or Refusal of Food and Hydration*, 2 Issues in L. & Med. 39 (1986); Connery, *The Ethical Standards for Withholding/Withdrawing Nutrition and Hydration*, 2 Issues in L. & Med. 87 (1986); Barry, *Facing the Hard Cases: The Ethics of Assisted Feeding*, 2 Issues in L. & Med. 99 (1986); Bleich, *Providing Nutrition and Hydration for the Terminally Ill Patients*, 2 Issues in L. & Med. 117 (1986); Meilaender, *The Confused, the Voiceless, the Perverse: Shall We Give Them Food and Drink?*, 2 Issues in L. & Med. 133 (1986); Horan, *Failure to Feed: an Ethical and Legal Discussion*, 2 Issues in L. & Med. 149 (1986); Johnson, *Withholding Fluids and Nutrition: Identifying the Populations at Risk*, 2 Issues in L. & Med. 189 (1986); Grant & Forsythe, *The Plight of the Last Friend: Legal Issues for Physicians and Nurses in Providing Nutrition and Hydration*, 2 Issues in L. & Med. 277 (1987); Havens, *Psychosocial Implications of Providing Nutrition and Hydration to Patients*, 2 Issues in L. & Med. 301 (1987); Burt, *Withholding Nutrition and Mistrusting Nurturance: The Vocabulary of* In re Conroy, 2 Issues in L. & Med. 317 (1987); Bopp, *Nutrition and Hydration for Patients: The Constitutional Aspects*, 4 Issues in L. & Med. 3 (1987).

[28] The American Academy of Medical Ethics (AAME), with 20,000 associated physicians, has articulated clearly a position in opposition to the withdrawal of nutrition and hydration from persons in the position of Nancy Cruzan. The position adopted by the AAME is published in May, Barry,

(footnote continued)

vulnerable to being denied such necessities of life are in opposition to such practice.[29]

In sum, no consensus exists which would approve the specific activity for which the Guardians seek constitutional protection; indeed, widespread opposition exists, which is reflected in numerous state laws and decisions by three state supreme courts.

B. This Nation Has Historically Not Recognized Authority in Any Guardian of an Incompetent Person to Cause Death by Starvation and Dehydration of His or Her Ward.

Focusing on the Guardian-Ward relationship between the Guardians at bar and Nancy Cruzan further reveals the lack of any support by the People to withholding food and fluids from Nancy Cruzan either in the history and tradition of our Nation or in any current national consensus.

Guardians have historically been required to provide the

Footnote 28 continued

Griese, Grisez, Johnstone, Marzen, McHugh, Meilaender, Siegler & Smith, *Feeding and Hydrating the Permanently Unconscious and Other Vulnerable Persons*, 3 Issues in L. & Med. 203 (1987). Other organized medical groups opposed to the withdrawal of nutrition and hydration in such cases are the Christian Medical Dental Association, with 8,000 members, and the National Federation of Catholic Physicians' Guilds.

[29] Brief Amici Curiae of The Association for Retarded Citizens of the United States, The Association for Persons with Severe Handicaps, The Ethics and Advocacy Task Force of the Nursing Home Action Group, and The Medical Ethics Task Force of The United Handicapped Federation in Support of Respondents, herein; *ARC Resolution on Cessation of Nutrition and/or Hydration*, 3 Issues in Law & Medicine 313 (1987) (setting forth the position of the Associated for Retarded Citizens of the United States (ARC) adopted October 25, 1986); *TASH Resolution on Nutrition and Hydration* 3 Issues in Law & Medicine 315 (1987) (setting forth the position of The Association for Persons with Severe Handicaps (TASH) adopted November 15, 1986); *United Handicapped Federation Resolution*, 3 Issues in Law & Medicine 317 (1987) (setting forth the position of United Handicapped Federation adopted April 10, 1986).

basic necessities of life for their incompetent wards. *See, e.g.*, Mo. Ann. Stat. § 475.120(3)(3) (Vernon Supp. 1989) (providing that the guardian of an incapacitated person must promote and protect the care, health, and welfare of the ward). *Cf.* Brief Amici Curiae of The Association for Retarded Citizens of the United States, et al. in Support of Respondents, herein, at Section III (setting forth the general powers and duties of guardians). This, of course, has historically included provision of nutrition and hydration to the ward, which many guardianship statutes even articulate. *See, e.g.*, Nev. Rev. Stat. Ann. § 159.079(1)(a) (Michie 1986) (requiring the guardian to provide the ward with food, clothing, and shelter).

Where a guardian has abused his ward, his action has traditionally been punishable under the criminal law. *See, e.g.*, Or. Rev. Stat. § 163.200(1) (1987) ("A person commits the crime of criminal mistreatment . . . if . . . the person withholds necessary and adequate food . . . ."); 39 Am. Jur. 2d *Guardian and Ward* § 68 (1964); *State v. Serebin*, 119 Wisc. 2d 837, 350 N.W. 2d 65 (1984) (nursing home administrator convicted of criminal abuse for failing to provide residents with adequate food).

In sum, tradition and history demonstrate that guardians were prohibited from intentionally starving to death a ward. Only recently has the practice been condoned in a few cases. These cases recognized that, normally, a guardian would be criminally and civilly liable if he caused the death of a ward by starvation. For example, *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985), held that absent bad faith, no guardian who withdrew life-sustaining treatment (defined to include food and fluids) could be criminally or civilly liable, but that the chance of criminal abuse warranted official supervision.

However, the fact that a few recent cases, such as *Conroy*, now hold starvation of a ward not to be criminal does not decide the issue of fundamentality. To so hold would be to beg the very question before this Court. These cases are part of the national debate, as are *Cruzan* and its supportive cases. To arbitrarily select either *Cruzan* or *Conroy* as establishing a consensus for

purposes of determining fundamentality would be to ignore the other case. There can be no contemporary consensus where two lines of current cases are so radically opposed and have such substantial support.

The result is that the only way that the proposed fundamental activity in this case may be tested against the tradition and history of our Nation is to consider the matter historically. Historically, there has been no right of a guardian to starve and dehydrate his or her ward to death.

CONCLUSION

For the reasons given above, there can be no proper formulation of the proposed fundamental right herein which does not take into account the basic facts of this case. The most basic of all the facts is that the activity for which constitutional protection is sought herein includes the active taking of the life of Nancy Cruzan, who is not terminally ill, by starvation or dehydration, when there is no clear and convincing evidence of her wishes. Such activity has never constituted a fundamental right in the history and tradition of our Nation. Because there is no constitutional right of the Guardians contravened by the decision of the Missouri Supreme Court, it should be affirmed.

Respectfully submitted,

JAMES BOPP, JR.
Counsel of Record

RICHARD E. COLESON
Brames, McCormick, Bopp & Abel

191 Harding Avenue
P.O. Box 410
Terre Haute, Indiana 47808-0410
(812) 238-2421

Counsel for Amicus Curiae

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